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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-669

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL.,
Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 19, 1973

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Respondent, Aluminum Company of America, respectfully requests that the petition for writ of certiorari filed herein by petitioners be denied. As pointed out hereinafter in this brief, the issues of law involved in this case are simple, have been clearly defined by previous decisions of this and lower appellate courts, and there are no conflicts with decisions of other courts on the same matter.

QUESTIONS PRESENTED

Respondent does not agree with the statement of questions set forth at page two of the petition for certiorari. Questions numbered 2 and 3 have been heretofore litigated and decided by this Court in

Admiral-Merchants Motor Freight, Inc. v. *United States,* 404 U.S. 802, 30 L.Ed.2d 37, 92 S. Ct. 51 (1971). The remaining question as to whether Section 16(2) of the Interstate Commerce Act has been incorporated into the Motor Carrier Act so as to establish a private cause of action for enforcement of an I.C.C. order for the payment of money, is so clearly established that it does not warrant further consideration from this Court.

STATEMENT OF THE CASE

Following hearing and investigation, the Interstate Commerce Commission entered an order on June 5, 1969, which denied freight rate increases charged by the member motor carriers of the Middle West Motor Freight Bureau, Inc. Among other things, the Commission found that the increases in freight rates had not been shown to be just and reasonable.

Effective April 1, 1968, and prior to hearing before the Commission, the motor carriers had been collecting the increased charges from shippers, including respondent Aluminum Company of America. The Commission's order of June 5, 1969, ordered that the carriers refund to shippers the charges on shipments moving subsequent to May 20, 1968, to the extent that "such charges included the increases herein found not shown to be just and reasonable." *Increased Rates and Charges From, To and Between Middle West Territory,* 335 I.C.C. 142. Thereafter, following petitions for reconsideration, the Commission affirmed its order requiring the motor carrier to make refunds to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence.

The authority of the Interstate Commerce Commission to issue a refund order was challenged by the motor carriers in a judicial review proceeding filed before a three-judge court in Colorado. The Court upheld the Commission. *Admiral-Merchants Motor Freight, Inc.* v. *United States,* 321 F. Supp. 353. This decision was appealed and affirmed, without opinion, by the Supreme Court. *Admiral-Merchants Motor Freight, Inc.* v. *United States, supra.*

The District Court rested its decision upholding the refund provision on the grounds that it was inserted by the Interstate Commerce Commission as an incident to granting a request for a continuance by respondents.[1]

Thus, petitioners have already contested the validity of the refund order in the Commission, in the Colorado District Court, and in the Supreme Court. In each forum they lost. The refund order has been held valid and it is not open to question in this case.

Prior to the expiration of the statute of limitations, respondent filed suits to enforce the Commission's refund order against petitioners. The District Court, upon motion for summary judgment filed by plaintiff, granted judgment for respondent, Alu-

[1] It is to be noted that at page four of the petition, it is stated that the request for continuance was initiated by protestants and *acquiesced in* by the motor carrier respondents. This is not in accordance with the record. See Appendix C-5 wherein the Colorado District Court quoted a letter filed by respondents requesting a postponement because of the impossibility for respondents to compile the required data.

minum Company of America.[2] On appeal the District Court's judgment was affirmed.[3]

ARGUMENT IN OPPOSITION TO GRANT OF CERTIORARI

1. These cases do not involve power of the Interstate Commerce Commission to issue a refund order. That issue is closed. This Court has entered its judgment upholding the validity of the order. Respondent filed these cases to enforce the refund order of the Interstate Commerce Commission. Thus, this is nothing more than an action by a private party to enforce a Commission order entered for its benefit.

Section 16(2) provides that, upon failure to comply with an order for payment of money, any person for whose benefit such order was made may enforce the order by filing suit in the United States District Court. Section 205(g) of Part II of the Interstate Commerce Act provides that any final order made under Part II shall be subject to the same right of relief in court as is now provided with respect to orders of the Commission under Part I. The refund order was a final order issued under Part II of the Act. As the trial court held (see Appendix D-10):

> "Because no doubt exists that we are dealing with a final order made under Part II of the Interstate Commerce Act and because we have concluded above that the plaintiff is a party in interest to such order, we must, therefore, look to Part I of the Act to determine the scope of plaintiff's rights."

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[2] *Aluminum Company of America* v. *Admiral-Merchants Motor Freight, Inc.*, 337 F. Supp. 674; *Aluminum Company of America* v. *Burlington Truck Lines, Inc.*, 342 F. Supp. 166.

[3] *Aluminum Company of America* v. *Admiral-Merchants Motor Freight, Inc.*, —— F.2d —— (7th Cir., 1972).

The pertinent section of Part I is Section 16(2) and no one denies that this confers upon shippers, such as respondent herein, the right to enforce an order for payment of money issued for the benefit of such shippers.

2. Petitioners apparently confuse the right of a shipper to enforce a Commission order for the payment of money with the issue as to whether the Commission has the power to grant reparations in a motor carrier case (petition, p. 8-9). The Supreme Court's opinion in *TIME, Inc.* v. *United States,* 359 U.S. 464, 470, 3 L.Ed.2d 952, 795 S. Ct. 904 (1959), involved a shipper's right to reparations. It did not involve its right to enforce a refund order. Petitioners assert that, because the *TIME* case held that the Commission could not issue reparations orders under Part II, this means that shippers cannot enforce refund orders under Part II. The two are not related and the argument of petitioners is fallacious.

The essence of petitioners' argument seems to be that the Interstate Commerce Act empowers the Commission to enter a refund order on behalf of shippers but denies such shippers any right to collect such refund. This is an absurd construction. It would be a strange result for a court to hold that an order was valid but the parties for whose benefit it was issued had no standing to collect the refund or enforce the order.

3. Petitioners assert that the precedent established in these cases will have repercussions of enormous magnitude (petition, pp. 9-11). It is stated that 143 complaints have been filed in 21 different state and federal courts and that millions of dollars will be involved. Assuming the accuracy of these representa-

tions, this provides no basis for granting a writ of certiorari. Petitioners collected the increased charges during the pendency of the general rate investigation. They received the benefit of a continuance of the hearing, and one of the conditions of the continuance was a refund of the disputed increase in the event of an adverse decision. As the Court of Appeals stated in its opinion "Having accepted the benefits afforded by the continuance of the rate hearing, defendants should now be required to provide the agreed upon exchange —*quid pro quo.*" (App. D-67).

4. Petitioners seek to leave the impression that there is a conflict among decisions in the various circuits regarding the merits of the shipper's right to enforce the refund order of the Commission (page 10 of the petition). However, petitioners do not cite any case where, *on the merits,* a result contrary to the judgment rendered by the lower court in this case was reached. The one reported case, *Bela Seating Company* v. *Advance Transportation Co.,* 344 F. Supp. 854 (1972) cited as adverse to the lower court's ruling, held that summary judgment was denied because the essential affidavits necessary for such a motion were totally missing. Significantly, in that case, the court *denied a motion to dismiss by the motor carriers because the complaint did state a cause of action under Section 16(2) of the Interstate Commerce Act.* Consequently, it is clear that the *Bela* case is completely consistent with the opinions of the lower court in this case and is not inconsistent as is implied by petitioners.

5. Petitioners assert that the effect of the Commission's action in the *Middle West* case, *supra,* was to place an unconscionable burden on motor carriers

who are seeking increases in freight rates (p. 11-13 of petition). They contend that, regardless of the statutory period for suspension of rates, no carrier can put increases of rates into effect until final approval by the Commission without running the risk of "punitive repayment" orders.

Such assertions are completely without foundation. The Commission did not suspend the increased rates which became effective April 1, 1968. The increased rates were collected for nearly a year and a half from the shipping public. At the end of that time, the Commission found that the increases had not been shown to be just and reasonable.

The motor carriers are obviously paying no refund claims voluntarily. They have not paid respondent's claim as of this time. It is asserted that millions of dollars are involved. But the carriers have had the use of funds derived from these increases for over four years. The Commission has held that they were not entitled to such increases. Petitioners have thus, in effect, had the advantage of an involuntary loan from the shipping public. Furthermore, because of the enormous time and expense involved, many shippers will not even attempt to recover the refunds which are due to them under the Commission's order.

It was pointed out in the Court below that refund orders are not normally issued by the Interstate Commerce Commission.[4] The peculiar circumstances involved in the Middle West case dictated the use of the refund procedure. The Commission permitted the increases to take effect prior to the rate investigation. It would be derelict in its responsibility to the public

[4] See court's opinion at App. D-62.

if it permitted the proceedings to drag on for a long period of time under those circumstances. When the carriers requested an extension of time for the hearing, the Commission conditioned the grant of such an extension upon the imposition of a refund provision. Thus, it is petitioners who have taken advantage of the shipping public—not the other way around. It is petitioners who are now forcing shippers to undergo costly federal court proceedings as a penalty to deter enforcement of claims. Clearly small shippers do not have the means or technical knowledge to permit them to enforce their rights and the refunds which are due to them will never be recovered. It is sheer nonsense to argue that it is the motor carriers who have been badly used by the Commission, the courts and the public.

6. The final argument made by petitioners in support of granting a writ of certiorari involves a contention that petitioners were denied an opportunity to prove that the rates and charges collected were just and reasonable (petition p. 15-17). It is contended that the Commission's finding that the assailed rates had "not been shown to be just and reasonable" is a different proposition than a finding that such rates are unjust and unreasonable. Once again, as pointed out many times in the opinions below, petitioners are attempting to treat this proceeding as a reparations proceeding where the burden of proof is on plaintiffs to prove that the assailed rates are unjust and unreasonable. This is nothing of the kind. This case is simply an enforcement proceeding whereby respondent, as a shipper, seeks to enforce a refund order entered by the Interstate Commerce Commission for the benefit of shippers generally. If the refund order is valid, and this Court has already held

that it is, then this respondent, as well as other shippers, are entitled to avail themselves of the remedies for enforcement as provided by the Interstate Commerce Act.

CONCLUSION

This case, when stripped of the many ingenious, but wholly irrelevant legal theories, is very simple. The Interstate Commerce Commission ordered petitioners to refund certain freight charges which the Commission found not shown to be just and reasonable. That refund order was vigorously attacked by petitioners but was ultimately upheld. All respondent seeks in this proceeding is that which the Commission's order states it is entitled to. The Act clearly gives respondent the right to enforce such an order in the District Court. Nothing else is involved. It would be unthinkable for this Court to waste its time on a matter of so small significance.

WHEREFORE, the premises considered the writ of certiorari prayed for by petitioners should be denied.

Respectfully submitted,

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